In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 379

THE MUCKLESHOOT TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Claiming aboriginal title to approximately 491,520 acres of land in the State of Washington which had been ceded to the United States under the so-called Point Elliott Treaty of 1855, 12 Stat. 927, petitioner instituted this proceeding before the Indian Claims Commission. The Commission held that the bands of Indians which later became the Muckleshoot Tribe had occupied only 101,620 acres of the property claimed. It concluded that the tribe was not a party to the Point Elliott Treaty, but granted compensation to

petitioner for the land taken as of the date of the treaty's ratification (March 8, 1859). See 3 Ind. Cl. Comm. 658, 669; 6 Ind. Cl. Comm. 608, 624; 12 Ind. Cl. Comm. 743, 751. In summarily affirming the decision of the Indian Claims Commission, the Court of Claims specifically excepted "the finding and statement that the appellant tribe was not a party to the Treaty of Point Elliott. Since that finding and statement were unnecessary to the disposition of the case as it finally developed before the Commission, and are equally unnecessary to the disposition of the appeal in this court, and may have collateral consequences in extraneous circumstances, the court vacates the finding and statement without passing in any way upon their correctness" (Pet. App.).

The exception included in the Court of Claims' affirmance plainly benefited petitioner, which is seeking to assert fishing rights under the treaty against the State of Washington. Petitioner's principal contention is that the court should have gone further and decided, contrary to the findings of the commission, that petitioner *was* a party to the treaty. Since the court was clearly correct in concluding that the commission's conclusion did not turn on whether petitioner was a party to the treaty, petitioner is not entitled to any more relief than the Court of Claims granted.

There is also no merit to petitioner's contention that the Indian Claims Commission erred in not considering 23 small village groups of Indians as a single "band" having exclusive use and possession of the large area for which they seek compensation. This Court has defined Indian title as exclusive use and

occupancy by claimants in the sense that it related to definable territory occupied exclusively by a specific tribe of Indians. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339. The test of exclusive use and occupancy has been applied in numerous cases in the same manner as it was here. *E.g.*, *Northwestern Shoshone* v. *United States*, 95 C. Cls. 642, 682, affirmed, 324 U.S. 335; *Snake Indians* v. *United States*, 125 C. Cls. 241, 254, 112 F. Supp. 543; *Crow Tribe* v. *United States*, 151 C. Cls. 281, 284 F. 2d 361; *Skokomish Tribe* v. *United States*, 6 Ind. Cl. Comm. 135, 158; *Red Lake Band* v. *United States*, 7 Ind. Cl. Comm. 576, 610. Petitioner was, therefore, properly denied compensation for land which was commonly used and occupied by a number of Indian "bands."

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
ELIZABETH DUDLEY,
Attorneys.

AUGUST 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 228391 121